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No. 07-1194

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

STEVE HENLEY,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the Sixth Circuit erroneously denied habeas relief by holding that a defendant's right under the Due Process Clause to challenge the discriminatory composition of the grand jury that indicted him was not sufficiently "dictated" by this Court's precedents in 1990, when Henley's conviction became final?

2. Whether the Sixth Circuit erroneously denied habeas relief by holding that Henley was not plainly prejudiced by his counsel's deficient performance at sentencing?

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OPINION BELOW

The opinion of the court of appeals that is the subject of this petition is published at 487 F.3d 379. (App. 1a) The memorandum opinion of the district court relevant to Henley's claims (App. 94a) is unreported.

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals were entered on May 15, 2007. (App. 1a) The court denied rehearing on October 17, 2007. (App. 271a) By order entered January 2, 2008, Justice Stevens extended the time for filing a petition for writ of certiorari from January 15, 2008, until March 15, 2008. (07A541) Petitioner filed a certiorari petition on March 17, 2008. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254, which governs the remedy of federal habeas corpus for applicants in State custody, provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court

proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

I. Procedural History

In 1986, a Tennessee jury convicted Steve Henley of two counts of first degree murder and one count of aggravated arson. The jury sentenced Henley to death for the murders, and he received a 20-year sentence for the arson. The Tennessee Supreme Court affirmed the judgment, and this Court denied certiorari. *State v. Henley*, 774 S.W.2d 908 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990). In his direct appeal, Henley raised no challenge to the composition of the grand jury that indicted him.

Henley subsequently sought post-conviction relief. Here again, Henley did not contest the make-up of his grand jury; he did, however, assert that he was denied the effective assistance of counsel at his capital sentencing hearing. Following an evidentiary hearing, the trial court denied relief. On appeal, the Tennessee Court of Criminal Appeals reversed, finding that counsel was ineffective during sentencing. *Henley v. State*, No. 01C01-9506-CC-00193, 1996 WL

234075 (Tenn. Crim. App., May 9, 1996). However, the Tennessee Supreme Court reversed the Court of Criminal Appeals and reinstated the judgment of the trial court after finding that the Court of Criminal Appeals erred in finding that Henley was prejudiced by counsel's performance at sentencing. *Henley v. State*, 960 S.W.2d 572 (Tenn. 1997), *cert. denied*, 525 U.S. 830 (1998). As to trial counsel's attempt to call Henley's mother as a witness at sentencing, the court stated:

> . . . Henley's mother did not refuse to testify in the presence of the jury. Instead, she asked to first speak with trial counsel. Although the record reflects that she thereafter did not testify, at no time did she openly refuse to testify on Henley's behalf in the presence of the jury as the Court of Criminal Appeals' decision indicates. In addition, the fact that the jury was not provided with an explanation as to why Dorothy Henley did not testify does not justify a finding of prejudice. The jury was instructed to base its sentencing decision on the evidence presented at trial, not upon speculation about why a particular witness did not testify. Jurors are presumed to follow the instructions given them in arriving at a verdict. *State v. Laney*, 654 S.W.2d 383, 389 (Tenn. 1983); *State v. Blackmon*, 701 S.W.2d 228, 233 (Tenn. Crim. App. 1985). Therefore, it is not appropriate to "assume" the defense was prejudiced because Henley's mother was not called as a witness in his behalf at the sentencing

> hearing. The fact that Dorothy Henley asked to speak with counsel when called as a witness and thereafter did not testify does not constitute a reasonable probability sufficient to undermine confidence in the outcome of the proceeding.

(App. 74a)

The Tennessee Supreme Court also addressed Henley's complaint that counsel's failure to call additional mitigation witnesses prejudiced him at sentencing.

> Finally, the record does not support the Court of Criminal Appeals' statement that prejudice was established because there was a "dearth of favorable testimony offered at the sentencing hearing, when significant amounts of favorable testimony were available." As was previously stated, when assessing the existence of prejudice in the face of an alleged deficiency involving counsel's failure to present mitigating evidence in the penalty phase of a capital trial, we consider whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings; the nature and extent of the mitigating evidence that was available but not presented; and whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination. *Goad,* 938 S.W.2d at 371 (citing cases).

In this case, the record fully supports the trial court's statement that, through the testimony of Bertha Henley and the petitioner, the original sentencing jury had before it basically the same favorable mitigation evidence that was offered by the many witnesses at the evidentiary hearing on the post conviction petition. As previously summarized herein, the jury heard extensive testimony about Henley's relationship with his grandparents, including his own testimony that he loved them more than anyone else in the world. It is difficult to imagine a more favorable and detailed description of the petitioner's character than that given by Bertha Henley. It is clear from the proof at trial and the evidentiary hearing in this case that the petitioner had a closer relationship with his grandmother, Bertha Henley, than with any other living family member. Indeed, the petitioner's own mother acknowledged that she could have offered no further information about Henley and his life than that given by Bertha Henley at the sentencing hearing.

Dorothy Henley admitted that in the years preceding the murders she had resided in Davidson County and had little contact with her son. On cross-examination, Dorothy Henley also admitted that she visited her son only a few times in jail before his trial. Overall, Dorothy Henley used very general terms to describe her relationship with her son. Similarly, Henley's older sister gave only general information about the petitioner, and conceded that she had little contact with her

brother during the five years preceding the homicides.

While Henley's younger sister and second wife had closer associations with him near the time of the murders, both also had personal knowledge about his use of drugs, specifically marijuana, which was brought out during cross-examination at the evidentiary hearing. Had these two witnesses testified at the sentencing hearing, that same information, no doubt, would have been brought to light. In view of Henley's testimony throughout the trial that he had never abused drugs, the testimony of two family members to the contrary would have been extremely detrimental to the defense.

The only other testimony offered at the evidentiary hearing was that of Henley's children who claimed they would have testified had trial counsel contacted their mother with whom they were residing. However the children, eleven and thirteen years old at the time of the trial, admittedly were not informed about the trial until its conclusion.

Therefore, the witnesses which were available but not called as witnesses at the original trial, would have offered general, vague testimony about the petitioner's character, and the evidence regarding the petitioner's use of drugs and alcohol was unfavorable. Moreover, none of these witnesses had a particularly close relationship with the petitioner near the time of the killings. In

> contrast, the mitigating proof actually presented was detailed, poignant, and favorable and was provided by the petitioner and his grandmother, with whom he had a close relationship. It is significant that the State did not cross examine either the petitioner or his grandmother at the sentencing hearing.
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> In our view, the petitioner has not established the existence of a "reasonable probability that, absent [counsel's] errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069.

(App. 75a-78a)

On July 23, 1998, Henley filed a petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee. While his habeas action was pending, Henley filed a motion in the state trial court seeking to reopen his first petition for post-conviction relief, in which he asserted for the first time that he had been indicted by a grand jury from which women had been systematically excluded as grand jury forepersons in violation of his right to due process, equal protection, and to a jury selected from a fair cross-section of the community. The trial court denied the motion, and the Tennessee Court of Criminal Appeals affirmed after concluding that Henley's claim failed to satisfy the narrow criteria for reopening a petition under Tennessee's

Post-Conviction Procedure Act set forth in Tenn. Code Ann. § 40-30-217 (1997) (now codified at Tenn. Code Ann. § 40-30-117 (2006)).[1]

On April 1, 2003, the district court entered a memorandum opinion and order granting respondent's motion for summary judgment and dismissing the petition. (App. 94a) Henley appealed. On May 15, 2007, the United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. *Henley v. Bell*, 487 F.3d 379 (6th Cir. 2007) (reh. denied). That decision is the subject of the instant petition.

II. Facts Relevant to the Petition

The proof at Henley's criminal trial and sentencing is accurately summarized in the Tennessee Supreme Court's decision on direct appeal. *Henley*, 774 S.W.2d at 912-13. On July 24, 1985, Henley and Terry Flatt were driving around Jackson County, Tennessee. According to Terry Flatt, the two had been drinking and taking drugs. That evening, the two were

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[1] The pertinent statutory provision states that a petitioner may file a motion to reopen a first post-conviction petition *only if* the claim is based on a final appellate ruling "establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial." Tenn. Code Ann. § 40-30-117.

driving along the road leading to Henley's grandmother's home. As they passed the home of the victims, Fred and Edna Stafford, Henley said "there was some people that lived on that road that owed his grandmother or grandfather some money, and they done him wrong, his grandparents wrong years before, and he was going to stop and see about collecting some money off them." Henley then let Flatt out of the truck before going on to his grandmother's home. *Id.*

When Henley returned a few minutes later, he had a .22 caliber rifle. Henley loaded the rifle and filled a plastic jug with gasoline from a can in the back of his truck. He then told Flatt to bring the rifle, and the two men approached the Staffords' home. The Staffords were outside as the men approached, and Henley told them that Flatt would kill him if they did not give him money. Henley then took the gun from Flatt, sending him back to the truck for the gallon of gasoline while Henley and the Staffords went into the house. As Flatt returned, he saw Henley shoot Mr. Stafford and then turn and shoot Mrs. Stafford. Henley then took a pistol and shot Mrs. Stafford again. Henley told Flatt to pour out some gasoline. When Flatt failed to do so, Henley poured the gas and lit it with a match. The two men then fled in petitioner's truck. As they drove, petitioner pulled some money out of his pocket. According to Flatt, he had not seen petitioner with the money prior to stopping at the Staffords' home. Some distance away petitioner

threw the rifle and pistol off to the side of the road. *Id.*

The autopsy revealed that Fred Stafford died from a bullet wound through the heart. Edna Stafford died as the result of burns and inhalation of noxious gasses. *Id.* at 912-13. A search of the scene revealed a spent .22 rifle shell near Fred Stafford's body. The shell was fired from a Marlin .22 rifle found in the area where Flatt stated Henley had hidden the rifle after the murders. Although the rifle was not positively identified as the murder weapon due to its condition, Henley's brother David testified that it was similar to one that he had purchased and left at his grandmother's home. David Henley's identification was based on a loose part at one end of the rifle and an area where the bluing had been scratched. He further stated that his rifle was no longer at his grandmother's home. Another witness, Ronald Leonard, also identified the rifle as looking "just like" a rifle that he had traded to David Henley. Even Henley conceded that the rifle retrieved as evidence was similar to the one belonging to his brother. *Id.* at 913.

Additional evidence established the existence of bad feelings between Henley and the Staffords. Further proof demonstrated that Henley had to refill the five-gallon can of gasoline in his truck the weekend after the fire. A neighbor of the Staffords testified that she saw Henley drive past her home, apparently on the way to his grandmother's house. Some time later she heard a loud noise, possibly an explosion,

and then she saw Henley's truck coming back down the road. A short time after that, her husband saw smoke coming from the direction of the Staffords' home. When they went to investigate, the fire was everywhere. *Id.* at 913-14.

Henley testified that, although he had spent the day of the murders with Terry Flatt, he had not taken any drugs, nor was he intoxicated. According to Henley, he asked Flatt to get out of the truck before going to his grandmother's home because Flatt was intoxicated. Henley claimed that Flatt took the .22 rifle with him to hunt while he waited for Henley to return. Henley denied murdering the Staffords or setting the fire. *Henley v. State*, 960 S.W.2d at 575.

At sentencing, the State relied on the proof established during the guilt phase. Petitioner's grandmother testified regarding petitioner's upbringing and the close relationship petitioner had always had with his grandparents. In addition, petitioner testified in his own behalf. *Id.* at 575-76.

The jury unanimously found that the State had proven beyond a reasonable doubt the existence of one aggravating factor – that the murder was especially heinous, atrocious, or cruel, in that it involved torture or depravity of mind. The jury also found beyond a reasonable doubt that the aggravating circumstance outweighed the mitigating evidence and imposed a death sentence for each murder.

At the time of the post-conviction hearing, petitioner's trial counsel, James H. Reneau, III, was

deceased. A copy of Mr. Reneau's file was introduced into evidence. A number of Henley's family members testified to the effect that they loved him; that he was a good and loving man; that he was not a violent man; and that this behavior was out of character for him. *Id.* at 576-77. Additional evidence was offered regarding Henley's mental health and problems with drugs and alcohol. He dropped out of school in the tenth grade, and he suffered some significant financial losses shortly before the murders resulting in his filing for bankruptcy. *Id.* at 577.

III. The Opinions Below

The district court denied Henley's petition for writ of habeas corpus, finding in pertinent part that Henley's grand jury composition challenge under the due process and equal protection clauses of the Fourteenth Amendment was barred by the anti-retroactivity holding of *Teague v. Lane*, 489 U.S. 288 (1989). (App. 120a-129a) The court further concluded that Henley's grand jury challenge was not cognizable under the Sixth Amendment, which extends only to the composition of a petit jury. (App. 129a-132a) As to Henley's claim that he received ineffective assistance of counsel at sentencing, the district court ruled that the Tennessee Supreme Court's rejection of that claim was neither contrary to nor an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), the controlling authority on the issue. (App. 191a-198a)

The Sixth Circuit affirmed. The court of appeals rejected Henley's contention that the rule announced in *Campbell v. Louisiana*, 523 U.S. 392 (1998), was dictated by precedent existing at the time Henley's conviction became final, concluding that neither *Hobby v. United States*, 468 U.S. 339 (1984), nor *Peters v. Kiff*, 407 U.S. 493 (1972), compelled *Campbell*'s result for retroactivity purposes. (App. 6a-10a) The court further observed that this Court has never allowed a defendant to challenge the composition of the grand jury based on the Sixth Amendment. (App. 10a-11a) Finally, the court held that it was not unreasonable for the Tennessee Supreme Court to conclude that no prejudice resulted from counsel's failure to call additional lay witnesses given the evidence before it. (App. 11a)

> [W]e find nothing unreasonable in the Tennessee Supreme Court's conclusion that Henley was not prejudiced by counsel's alleged errors. . . . Henley's grandmother gave a "favorable and detailed description of Henley' [at trial]. . . . [O]ther lay witnesses likely would not have painted a better picture in light of 'their limited relationship with Henley at the time of the murders' and 'their personal knowledge of his drug use at the time of the murders.'" *See Henley*, 960 S.W.2d at 582. We cannot say that it was unreasonable for the Tennessee Supreme Court to conclude that counsel's failure to call additional lackluster lay witnesses

did not prejudice Henley at the mitigation phase.

(App. 11a-12a)

ARGUMENT

I. CERTIORARI IS NOT WARRANTED ON HENLEY'S GRAND JURY DISCRIMINATION CLAIM, BECAUSE THE CLAIM IS EITHER BARRED UNDER *TEAGUE V. LANE*, 489 U.S. 288 (1989), AS THE SIXTH CIRCUIT CONCLUDED, OR BY HENLEY'S STATE-COURT PROCEDURAL DEFAULT.

Petitioner seeks a writ of certiorari from the decision of the Sixth Circuit declining to consider interrelated challenges to the alleged systematic exclusion of women from the position of grand jury foreperson from 1974 to 1994, the period during which he was indicted for first-degree murder.[2] The Sixth Circuit rejected Henley's claim after finding that this Court's decision in *Campbell v. Louisiana*, 523 U.S. 392 (1998) – holding that a white criminal defendant has standing to raise both an equal protection and due process challenge to alleged

[2] Henley's claim was based on the Equal Protection and Due Process clauses of the Fourteenth Amendment and the "fair cross section" provision of the Sixth Amendment.

discrimination against black persons in the selection of grand jurors – was not retroactively applicable to cases on collateral review under *Teague v. Lane*, 489 U.S. 288 (1998), because *Campbell* announced a new rule of criminal procedure that was not dictated by existing precedent. Since Henley's conviction was final before *Campbell*, the court of appeals ruled that, under *Teague*, he may not rely on its retroactive application to support his Fourteenth Amendment claim. *Henley*, 487 F.3d at 384-87. (App. 6a-11a) The court of appeals further observed that this Court has never allowed defendants to challenge the composition of their grand juries under the Sixth Amendment, which applies exclusively to petit juries. *Id.* at 387. (App. 10a)

Henley challenges the Sixth Circuit's conclusion, arguing that a defendant's standing to challenge his indictment by a discriminatorily composed grand jury was well established before *Campbell*; indeed, according to Henley, that right was established "[l]ong before Henley's conviction became final." (Pet. 15) Under either scenario, however, Henley's claim is barred. If, as the Sixth Circuit concluded, the rule in *Campbell* was not dictated by existing precedent, Henley's claim is barred by the anti-retroactivity holding of *Teague*. On the other hand, if, as Henley asserts, the rule in *Campbell* derives from a long line of cases stretching back to *Strauder v. West Virginia*, 100 U.S. 303 (1880), at the earliest, or *Hobby v. United States*, 468 U.S. 339 (1984), at the latest, then habeas relief is barred because Henley failed to fairly

present his claim to the Tennessee state courts and is now barred from doing so under the waiver provisions of Tennessee's Post-Conviction Procedure Act.[3] Thus, because disposition of the retroactivity question in Henley's favor would not result in habeas relief, this case does not present a proper vehicle to resolve the question presented, and the petition should be denied.

Teague v. Lane, 489 U.S. 288 (1989), prohibits the retroactive application of a new rule to claims raised on collateral attack. A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. *Id.* at 301. Unless it falls within an exception to the general rule, a new rule will not be applied to cases that have become final before the new rule is announced. *Id.* at 310. There are two exceptions to the general rule: (1) if the new rule places certain kinds

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[3] Henley presented his constitutional claim to the Tennessee courts for the first time in a motion to re-open an earlier state post-conviction petition. He did not raise any challenge to the composition of his grand jury on direct appeal from his conviction or in his first post-conviction proceeding, both of which post-dated *Hobby*. Under Tenn. Code Ann. § 40-30-106(g), a claim for post-conviction relief is waived "if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless . . . the claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right. . . ."

of primary, private individual conduct "beyond the power of the criminal law-making authority to proscribe," or (2) if it requires the observance of "those procedures that ... are implicit in the concept of ordered liberty." *Id.* at 307.

Henley's gender-discrimination claim is grounded primarily in this Court's 1998 decision in *Campbell v. Louisiana*, 523 U.S. 392 (1998), which granted standing to a white defendant to raise both an equal protection and due process challenge against alleged discrimination of black persons in the selection of the grand jury. Indeed, petitioner presented his claim to the Tennessee state courts for the first time in April 1999 in a motion to re-open his petition for post-conviction relief.[4] Before Henley's conviction became final, however, this Court's precedent suggested the opposite – that a male lacks standing to challenge the alleged discrimination against women in the selection of grand jurors. *See, e.g.*, *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) ("This claim [challenging the improper exclusion of women from grand jury service] is novel in this Court and, when urged by a male, finds no support in our past cases."); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) ("In order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must

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[4] Nothing in *Campbell* addresses a male's standing to challenge the exclusion of women in the grand jury context. Nevertheless, Henley argues that it should be extended to that situation.

show that the procedure employed resulted in substantial under-representation of his race *or of the identifiable group to which he belongs.*") (emphasis supplied). Sixth Circuit precedent likewise was inconsistent with Henley's contention. *See Ford v. Seabold*, 841 F.2d 677 (6th Cir. 1988) (holding that a male defendant has no standing to challenge the exclusion of women from grand jury service under either the equal protection clause or the due process clause).

When Henley raised the issue in his motion to reopen state post-conviction proceedings, the Tennessee Court of Criminal Appeals concluded that *Campbell* announced a new rule regarding standing to contest discrimination in the selection of a grand jury and grand jury foreperson. However, the state court declined to consider the issue because Tennessee law permits consideration of such claims only if "[t]he claim is based upon a final ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial [and] retrospective application of that right is required." Tenn. Code Ann. § 40-30-217(a)(1) (now codified at Tenn. Code Ann. § 40-30-117(a)(1)). Applying the *Teague* analysis, the state court concluded that retroactive application of *Campbell* was not required. (App. 89a-90a) Likewise, the district court concluded:

> The constitutional right to assert standing for an equal protection or due process claim as a non-member of the class for whom the

> right is asserted (*i.e.*, to assert third-party standing for women) was not available to [Henley] when he was tried in 1986 or when he filed either his direct appeal (1987), his original post-conviction petition (1990), or his amended petition (1994).[5]

(App. 117a) The Sixth Circuit affirmed.

Henley argues at length that his standing to assert a gender-discrimination claim was "established long before *Campbell*." He further argues that the Sixth Circuit's non-retroactivity determination directly conflicts with the Fifth Circuit's holding in *Peterson v. Cain*, 302 F.3d 508 (5th Cir. 2002), *cert. denied*, 537 U.S. 1118 (2003), which held that *Campbell*'s pronouncements regarding standing to raise a *racial* discrimination challenge to a grand jury's composition under either due process or equal protection grounds was dictated by this Court's earlier precedents.

However, resolution of these issues is of no consequence in this case. Even if he is correct, Henley's claim is barred by procedural default (a defense respondent has maintained since the initial

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[5] Although the district court noted that *Campbell* relied on the prior precedent of *Powers v. Ohio*, 499 U.S. 400 (1991) – allowing a white defendant to challenge racial discrimination in the use of peremptory challenges – the court correctly observed that *Powers* was also decided after petitioner's case became final on direct appeal and that, in the absence of a determination that its holding was retroactive, the claim was barred under *Teague*. (App. 126a)

federal court pleadings), since he failed to raise any challenge to his grand jury composition in the Tennessee courts on direct appeal or in his initial post-conviction proceeding.[6] A habeas petitioner is required to exhaust state remedies by presenting the substance of his constitutional claim to the state courts prior to seeking federal habeas relief. 28 U.S.C. § 2254(b). Recognizing that principles of federal-state comity must restrain unnecessary "[f]ederal intrusions into state criminal trials," *Engle v. Isaac*, 456 U.S. 107, 128 (1982), this Court has held that the exhaustion requirement must be "rigorously enforced." *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

Petitioner's belated attempt to assert a grand jury challenge in a motion to reopen does not salvage it because it fails to satisfy the statutory criteria for reopening. Moreover, Henley expressly rejects the single criterion applicable to his situation – that the claim is based upon a decision establishing "a constitutional right that was not recognized as existing at the time of trial." Tenn. Code Ann. § 40-30-117(a)(1). If *Campbell* established no new rule, Henley's claim is barred by the state post-conviction statute of limitations under Tenn. Code Ann. § 40-30-102(a), the "one petition" limitation of § 40-30-102(c), and the waiver provision of § 40-30-106(g). Because Henley has never fairly presented his claim to the state

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[6] Warden Bell asserted this same position on appeal to the Sixth Circuit.

courts, and a state procedural rule prohibits the state court from extending further consideration to it, the claim is deemed exhausted (since there is no "available" state remedy) but procedurally barred from federal habeas review. *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991).

Because Henley's claim is procedurally barred regardless of whether *Campbell* is applied retroactively, further consideration of the issue would have no impact on the ultimate disposition of the case. Therefore, this case does not present an appropriate vehicle for resolution of the question presented for review.

II. CERTIORARI IS NOT WARRANTED ON HENLEY'S INEFFECTIVE ASSISTANCE CLAIM BECAUSE THE STATE COURT REASONABLY CONCLUDED THAT HE WAS NOT PREJUDICED BY ANY ALLEGED DEFICIENCY IN COUNSEL'S PERFORMANCE.

Henley contends that certiorari is warranted with respect to his ineffective assistance claim. He asserts that trial counsel's broken "promise" to the jury that they would hear from his mother at sentencing was prejudicial. (Pet. 28-29) However, Henley's characterization of counsel's actions overstates its significance. Unlike *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002), Henley's counsel did not "repeated[ly] vow" that the jurors would hear from Henley's mother. Indeed, counsel made no representation to the jury at the beginning of the sentencing phase

concerning any evidence that was to follow. This case simply presents no conflict on this point with any of the cases cited in the petition. Moreover, the presumption of prejudice, which Henley appears to advocate, flowing from this isolated incident at sentencing conflicts with this Court's decision in *Cone v. Bell*, 535 U.S. 685 (2002), instructing that prejudice will not be presumed based solely on counsel's decision to call no witnesses and to waive closing argument at petitioner's capital sentencing hearing.

Henley further asserts that he was "obviously prejudiced" by counsel's failure to investigate and call other witnesses at sentencing. (Pet. 32-33) The Tennessee Supreme Court adjudicated these claims in Henley's post-conviction appeal, and the federal courts properly limited review under the standard set forth in 28 U.S.C. § 2254(d). Because the state court's disposition was reasonable in light of the evidence presented and was rendered in accordance with the governing legal standard, certiorari is not warranted.

A conclusion that counsel was constitutionally ineffective requires a two-part determination. First, counsel's performance must be found to be deficient. Second, as a result of that deficient performance, petitioner must have suffered some prejudice. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In this case, the state court decision rests upon petitioner's failure to satisfy the prejudice

prong. This is due, in large part, to the death of trial counsel prior to the post-conviction proceedings, which prevented any inquiry, beyond a review of his case file, into the considerations that went into counsel's sentencing strategy.

In rejecting Henley's ineffective assistance claim, the Tennessee Supreme Court correctly identified *Strickland* as the controlling precedent. The state court reviewed the evidence offered during the post-conviction hearing and compared it to the testimony presented to the jury. As to mental health evidence, the proof at Henley's state post-conviction hearing was limited and showed little more than that he suffered from depression, for which he may have been self-medicating with alcohol and drugs, and that his test scores might indicate a learning disability which could have contributed to, or caused, his business failures leading to the loss of the family farm. The state court noted that this testimony would have directly contradicted petitioner's statements that he did not use or abuse drugs and alcohol and that his business losses were the result of bad weather. In denying relief on this portion of the claim, the Tennessee Supreme Court made the following findings:

> While it is true that often a greater duty of inquiry into a client's mental health is imposed for the penalty phase of a capital trial, [citation omitted], it is also well-established that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or

> actions. . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. [citation omitted]
>
> At the trial of this case, the defendant maintained his innocence, flatly denied that he had been intoxicated on the day of the murders, and also denied ever abusing drugs. Moreover, Henley said his farming operation had failed because of unpredictable weather, a drought followed the next year by floods. Clearly then, the evidence for which trial counsel is now faulted for not discovering and introducing would have been inconsistent with the defendant's own testimony and harmful to the defense theory throughout the trial.

Henley, 960 S.W.2d at 583.

Henley's proffered testimony is similar to the mental health evidence this Court found insufficient in *Strickland* to support a claim of ineffective assistance. Moreover, the evidence is a far cry from the evidence of mental retardation available in *Wiggins v. Smith*, 539 U.S. 510, 531 (2003), and borderline mental retardation in *Williams v. Taylor*, 529 U.S. 362, 370 (2000).

As to the failure to call additional family members, the Tennessee Supreme Court again compared the testimony proffered at the post-conviction hearing

with that actually presented to the jury. The court found that, while the additional family members would have told the jury that they felt Henley was a good person who cared for his family, was close to his grandparents, and was upset over the loss of the family farm, their testimony would have been weakened by their lack of contact with Henley in the years immediately preceding the murders and by their knowledge of his drug and alcohol abuse. The court further observed that essentially the same information was presented to the jury by Henley's grandmother, one of the people he loved most in the world, and by Henley himself, who firmly denied drug and alcohol abuse. Indeed, the state court specifically noted that Henley's mother, who acknowledged that she had declined to testify during the trial, stated that she could offer nothing beyond the testimony given by Henley's grandmother.

As with the mental health evidence, this case is markedly different from the scenarios presented in *Williams* and *Wiggins*. In both of those cases, evidence existed demonstrating a "nightmarish childhood" and "severe privation and abuse." *Williams*, 529 U.S. at 370; *Wiggins*, 539 U.S. at 516-17. By contrast, in this case, as in *Strickland*, the omitted testimony merely repeated that offered by Henley and Bertha Henley – that Henley grew up in a loving and supportive environment, and was generally a good brother, son and grandson. Unlike the petitioners in *Williams* and *Wiggins*, who suffered physical, sexual, and emotional abuse, Henley's life was generally good.

The two notable losses in his life were the death of his grandfather and crop failure resulting in bankruptcy, events that, while tragic to an individual at the time, are shared by many people who do not go on to commit murders. The Tennessee court's decision was certainly reasonable by comparison.

The Sixth Circuit's decision presents no grounds for certiorari review, and the petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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